BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	
	)	

To: The Commission

REPLY COMMENTS OF OCTEL COMMUNICATIONS CORPORATION

OCTEL COMMUNICATIONS CORPORATION ("Octel"), through its attorneys, hereby submits its reply comments in response to the *Notice of Proposed Rulemaking* ("*Notice*")[1] regarding implementation of the infrastructure sharing provisions of new section 259 of the Communications Act of 1934, as amended (the "Communications Act").[2] Octel replies to the comments submitted on a very narrow aspect of the Commission's infrastructure sharing proposals—the protection of proprietary information and property of third party service providers. As the leading supplier of voice processing systems to government and business, including incumbent local exchange carriers ("LECs"), Octel has a vested interest in the outcome of this proceeding.

A number of commenters address the issue of protection of proprietary information and other property rights proposed by the Commission.[3] Only a very few of

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1 FCC 96-456, released November 22, 1996. The *Notice* called for comments to be filed by December 20, 1996 and reply comments to be filed by January 3, 1996.

2 Section 259 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

3 *See, e.g.,* Comments of NYNEX Telephone Companies, Comments of GTE Service Corporation, Comments of Sprint Corporation, Comments of AT&T Corp., Comments of the United States Telephone Corporation, Comments of Pacific Telesis Group, Comments of Southwestern Bell Telephone Company, Comments of the Rural Telephone Coalition, and Comments of MCI Communications Corporation.

these commenters argue that such information should be made available unconditionally to the qualifying carrier. For example, the Rural Telephone Coalition ("RTC") contends that "[q]ualifying carriers should be entitled to any proprietary business information needed to provide services through the infrastructure, facilities, technology, etc. that it acquires from a providing LEC." RTC Comments at 6.[4] The RTC continues: "[n]etwork information made available under Section 259 would be similar to information disclosed under Section 251(c)(5), but may tend to be more comprehensive because of the non-competitive relationship between the carriers." *Id.* at 7. Octel suggests that *none* of this network information may be made available when it is to the detriment of third party providers and is obtained without that party's explicit permission.[5]

In addition, the Commission should reject out of hand AT&T's suggestion that qualifying carriers should not be obligated to pay licensing or right-to-use fees for patented technology. AT&T Comments at 2, n.2. AT&T maintains that "ILECs that have obtained the right to use software generics from their switching vendors are entitled to use those facilities to serve not only their own traffic, but also service qualifying carriers that share the incumbent carriers' infrastructure under Section 259 without any additional costs or fees." *Id.* This is untrue, at least in Octel's case. Octel's vendor agreements do not permit the purchaser to disclose or release protected technology without Octel's permission or without compensation to Octel, and the Commission should not promulgate any rule that negates this contract protection. As a third party vendor, Octel has no obligations under section 259, and should not be unwittingly captured by any section 259 obligations of the incumbent LECs.

Some commenters that support protection of proprietary information and licensed technology emphasize protection for the benefit of the incumbent LEC. *See, e.g.,* Pacific

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[4] The RTC does acknowledge that "it would be appropriate . . . to require [the qualifying carriers] to treat the information as proprietary." *Id.*

[5] The RTC also purports to agree with the Commission's tentative conclusion that mandatory patent licensing is required by section 259 "where necessary to gain access to the shared capability or resource by the qualifying carrier's equipment." *Id.* at 6. However, the Commission had prefaced this conclusion with the qualifier "[I]n cases where licensed technology is the *only* means to gain access to facilities or functions subject to sharing requirements . . . ." Notice at ¶ 15 (emphasis supplied).

Telesis Comments at 8. (LEC proprietary information that a qualifying carrier does not need in order to provide service using the public switched network should not be considered "information" within the meaning of section 259); Sprint Comments at 4 (incumbent LECs should not be required to share proprietary information if they can show that nonproprietary alternatives are available). It is vital, however, and as other commenters do recognize, that this protection extend to third party vendors. *See* United States Telephone Association Comments at 5 (section 259 does not cover intellectual property or other property rights owned by others); NYNEX Comments at 12-13 (section 259(a) obligation should be subject to private parties' intellectual property rights and obligations—NYNEX may not have the right to sublicense certain software and no basis to assume Congress intended otherwise).

Southwestern Bell ("SWB") provides the most detailed and persuasive discussion of this issue. As SWB describes:

> Indeed, incumbent LEC networks are built upon licenses to use intellectual properties which are obtained from vendors . . . . [T]he incumbent LEC is unlikely to own those intellectual properties, or to have been granted the ability to license their use to a third party for its own use. An incumbent LEC may not even have the authority to disclose the vendor's proprietary technical information due to confidentiality requirements. For example, while the vendor's software code may be protected by patent and/or copyright, the technical documentation for the software or the equipment may be licensed as a trade secret subject to strict non-disclosure obligations.
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> The Commission cannot disregard legal rights associated with intellectual property, the limitations on those licenses, or require a sharing LEC to violate its lawful obligations or the rights of others through sharing infrastructure. There is nothing in Section 259 that even remotely indicates that the Commission has been authorized to override any party's intellectual property rights, or the binding legal obligations of incumbent LECs.

SWB Comments at 6-7.

Octel urges the Commission to adopt the comments proffered by Octel, SWB and others that demonstrate the need for unequivocal third party protection

as the Commission promulgates rules to implement incumbent LEC obligations under section 259 of the Communications Act. As Octel suggested in its comments in this proceeding, any mandatory licensing ultimately required by the Commission should be subject to the proprietary information restrictions in third party providers' licensing agreements. Furthermore, the protections the Commission envisions under section 259(c) should be extended to the entire section and should be available to third party service providers.

Respectfully submitted,

OCTEL COMMUNICATIONS CORPORATION

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CERTIFICATE OF SERVICE

I, Theresa Fenelon, an attorney with the law firm of Pillsbury Madison & Sutro, LLP, hereby certify that true and correct copies of the foregoing REPLY COMMENTS OF OCTEL COMMUNICATIONS CORPORATION were served by hand delivery this 3rd day of January, 1997, on the following:

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